

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CROP PRODUCTION SERVICES,
INC., formerly known as UAP
DISTRIBUTION, INC.;

Plaintiff,

v.

NARUM CONCRETE
CONSTRUCTION, INC.;

Defendant.

NO: 12-CV-5126-TOR

ORDER ON SECOND CROSS-
MOTIONS FOR SUMMARY
JUDGMENT

BEFORE THE COURT is Plaintiff's Motion for Summary Judgment re: Damages (ECF No. 61) and Defendant's Motion for Partial Summary Judgment re: Premises Liability (ECF No. 69). Also before the Court are the parties' cross-motions to exclude the anticipated testimony of their respective expert witnesses concerning the reasonableness of the attorney's fees incurred by Plaintiff in the underlying litigation (ECF Nos. 65 and 72). These matters were heard with oral argument on June 18, 2014. Plaintiff was represented by Brent S. Bastian and

1 Benjamin A. Schwartzman. Defendant was represented by Kimberly A. Reppart.
2 The Court has reviewed the briefing and the record and files herein, and is fully
3 informed.

4 BACKGROUND

5 This is an action to recover litigation costs pursuant to an indemnification
6 agreement. The Court previously ruled that (1) the indemnification agreement
7 “clearly and specifically” waived Defendant’s immunity from liability under the
8 Washington Industrial Insurance Act, RCW 51.04.010, *et seq.*; and (2) Plaintiff is
9 entitled to judgment as a matter of law on the issue of liability because there are no
10 disputed issues of fact concerning Defendant’s obligation to indemnify.

11 Plaintiff now moves for summary judgment on the issue of damages,
12 claiming \$397,549 in attorney’s fees and \$44,793 in costs incurred in the
13 underlying litigation. Defendant has filed a cross-motion for partial summary
14 judgment which seeks to prohibit Plaintiff from recovering fees and costs relating
15 to one of the two claims litigated in the underlying personal injury case. Both
16 parties have also moved to exclude the testimony of their respective experts
17 concerning the reasonableness of Plaintiff’s claimed damages award.

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FACTS¹

Plaintiff Crop Production Services, Inc., (formerly UAP Distribution, Inc.) (“UAP”) hired Defendant Narum Concrete Construction, Inc., (“Narum”) to perform excavation and concrete work on a construction site owned by UAP. The parties entered into a written agreement which required Narum to indemnify UAP against any claim, including associated litigation costs, “arising out of or resulting from performance of the Work . . . but only to the extent caused by the negligent acts or omissions of [Narum] . . . anyone directly or indirectly employed by [Narum] or anyone for whose acts [Narum] may be liable.” The agreement also required Narum to indemnify UAP against claims asserted by Narum’s employees, regardless of any “limitation on amount or type of damages, compensation or benefits payable by [Narum] . . . under workers’ compensation [laws].”

In February 2007, one of Narum’s employees, John Hymas (“Hymas”), was seriously injured when he fell into an open trench while helping to pour concrete. The trench was not protected by a guardrail or any other type of safety barrier. Hymas applied for and received worker’s compensation benefits. He later sued

¹ Many of the facts relevant to these motions are set forth in detail in the Court’s September 4, 2013 Order granting Plaintiff’s motion for partial summary judgment. *See* ECF No. 51. Those facts are incorporated herein by reference.

1 UAP in Benton County Superior Court, asserting claims for premises liability and
2 failure to comply with Washington Industrial Safety and Health Act (“WISHA”)
3 regulations. Narum was not named as a party in this lawsuit, presumably because
4 it was immune from suit under the Washington Industrial Insurance Act, RCW
5 51.04.010, *et seq.*

6 Shortly after being served with the lawsuit, UAP advised Narum that it was
7 contemplating a tender of its defense pursuant to the parties’ indemnification
8 agreement. Narum refused to accept any such tender on two grounds. First, it
9 asserted that it had no duty to indemnify because the claims arose exclusively from
10 UAP’s own conduct and there had been “no allegation . . . that Narum was in any
11 way negligent.” Second, Narum argued in the alternative that, even assuming that
12 it could be found partially liable, the indemnification agreement was unenforceable
13 because it did not contain a “clear and specific” waiver of Narum’s immunity
14 under the Industrial Insurance Act.

15 UAP managed its own defense and eventually won summary judgment on
16 both claims. Hymas appealed to the Washington Court of Appeals, which affirmed
17 in a published opinion. *Hymas v. UAP Distrib., Inc.*, 167 Wash. App. 136 (2012).
18 As relevant here, the Court of Appeals held that UAP owed no duty as a landowner
19 to protect Hymas from the dangerous condition created by Narum:

20 UAP turned raw land over to Narum. Narum dug and framed the
trench. Mr. Hymas and Narum were well aware of the obvious

1 dangerous condition, a five-foot-deep trench approaching the area of a
2 football field. Given Narum's unchallenged competence and 43 years
3 of performing concrete construction work, Mr. Hymas's 12 years of
4 experience working as a concrete pump operator, Narum's express
5 agreement to comply with safety laws and regulations, and Narum's
and Mr. Hymas's awareness of the hazard, no reasonable trier of fact
could find that UAP should have anticipated that Narum would allow
Mr. Hymas to perform work, and especially distracting work, adjacent
to the trench, without protecting him in some fashion from a fall.

6 *Id.* at 163-64.

7 UAP subsequently demanded reimbursement of its defense costs from
8 Narum pursuant to the indemnification agreement. Narum refused, once again
9 arguing that the agreement was unenforceable because it did not contain a "clear
10 and express" waiver of its immunity under the Industrial Insurance Act. UAP then
11 filed this lawsuit to recoup its defense costs and to recover attorney's fees incurred
12 in enforcing the indemnification agreement.

13 PROCEDURAL HISTORY

14 The parties previously filed cross-motions for summary judgment on the
15 issues of whether the indemnification provision was enforceable and, if so, whether
16 Narum's indemnification obligation had been triggered. The Court ruled in UAP's
17 favor, concluding that Narum had "clearly and specifically" waived its immunity
18 under the Industrial Insurance Act, and that Narum's duty to indemnify had been
19 triggered because the record conclusively established that Narum was negligent in
20 failing to erect a guardrail that would have prevented the accident. ECF No. 51.

1 Because UAP had not sought summary judgment on the issue of damages, and in
2 light of Narum's belated suggestion that Hymas and other non-parties may have
3 been contributorily negligent, the Court did not address how much of its defense
4 costs UAP was entitled to recover.

5 The parties now move for summary judgment on the issue of damages.
6 UAP seeks reimbursement of \$397,549 in attorney's fees and \$44,793 in costs
7 incurred in the underlying litigation. The parties have also filed cross-motions to
8 exclude the anticipated testimony of their respective experts concerning the
9 reasonableness of these figures. Finally, Narum has filed a motion for partial
10 summary judgment seeking to prohibit UAP from recovering attorney's fees and
11 costs relating to Hymas's premises liability claim.

12 DISCUSSION

13 Summary judgment may be granted to a moving party who demonstrates
14 "that there is no genuine dispute as to any material fact and that the movant is
15 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party
16 bears the initial burden of demonstrating the absence of any genuine issues of
17 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then
18 shifts to the non-moving party to identify specific genuine issues of material fact
19 which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S.
20 242, 256 (1986). "The mere existence of a scintilla of evidence in support of the

1 plaintiff's position will be insufficient; there must be evidence on which the jury
2 could reasonably find for the plaintiff." *Id.* at 252.

3 For purposes of summary judgment, a fact is "material" if it might affect the
4 outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any
5 such fact is "genuine" only where the evidence is such that a reasonable jury could
6 find in favor of the non-moving party. *Id.* In ruling upon a summary judgment
7 motion, a court must construe the facts, as well as all rational inferences therefrom,
8 in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372,
9 378 (2007). The court may only consider evidence that would be admissible at
10 trial. *Orr v. Bank of America, NT & SA*, 285 F.3d 764 (9th Cir. 2002).

11 **A. Narum is Liable for Defense Costs Relating to Hymas's Premises**

12 **Liability Claim**

13 Narum argues that is not responsible for fees and costs generated in defense
14 of Hymas's premises liability claim because it "did not agree to indemnify UAP
15 for claims arising out of UAP's sole negligence." ECF No. 80 at 1. In support of
16 this argument, Narum notes that it agreed to indemnify UAP "only to the extent" of
17 its own negligence. Because the premises liability claim arose exclusively from
18 UAP's alleged negligence, Narum argues, defense costs relating to this claim are
19 beyond the scope of the parties' indemnification agreement.

20 The Court is not persuaded. Although the premises liability claim purported

1 to arise exclusively from UAP's negligence (*i.e.*, independent of any negligence on
 2 the part of Narum), the crux of the claim was that UAP had a duty as a landowner
 3 to protect Hymas from the dangerous condition created by Narum. ECF No. 64 at
 4 ¶ 19; ECF No. 62-3, Ex. D. Somewhat simplified, Hymas's theory of liability was
 5 that UAP should have recognized that Narum was maintaining an unsafe work
 6 environment on its land and done something to correct the problem. Thus, the
 7 premises liability claim was essentially a bid to hold UAP liable for Narum's
 8 negligence.

9 Narum's efforts to avoid paying fees and costs generated in defense of this
 10 claim are unavailing. As Narum itself recognizes, an indemnification agreement
 11 must be applied in a manner consistent with the parties' intent. *Scott Galvanizing,*
 12 *Inc. v. Nw. EnviroServices, Inc.*, 120 Wash.2d 573, 580 (1993). Such intent "must
 13 be inferred from the contract as a whole; the meaning afforded the provision and
 14 the whole contract must be reasonable and *consistent with the purpose of the*
 15 *overall undertaking.*" *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme*
 16 *Nw., Inc.*, 168 Wash. App. 86, 100 (2012) (emphasis added) (quotation omitted).

17 The relevant indemnification language in the parties' contract reads:

18 **§ 8.13.1** To the fullest extent permitted by law, [Narum] shall
 19 indemnify and hold harmless [UAP] . . . from and against claims,
 20 damages, losses and expenses, including but not limited to attorneys'
 fees, fees related thereto or to the enforcement of this paragraph,
 arising out of or resulting from performance of the Work . . . **but only**
to the extent caused by the negligent acts or omissions of [Narum],

1 a Subcontractor, anyone directly or indirectly employed by them or
 2 anyone for whose acts they may be liable, **regardless of whether or
 not such claim, damage, loss or expense is caused in part by**
 3 **[UAP]. . . .**

4 § 8.13.2 In claims against [UAP] by an employee of [Narum] . . . the
 indemnification obligation under Section 8.13.1 shall not be limited
 5 by a limitation on amount or type of damages, compensation or
 benefits payable by [Narum] under workers' compensation acts,
 6 disability benefit acts or other employee benefit acts.

7 ECF No. 34-2 at 8 (emphasis added).

8 This language illustrates that the parties intended for Narum to indemnify
 9 UAP against claims asserted by an injured Narum employee for which Narum was
 10 at least partially at fault. When read together, Sections 8.13.1 and 8.13.2 further
 11 illustrate that the parties intended to circumvent the immunity afforded to Narum
 12 by the Industrial Insurance Act.² This intent to circumvent the Industrial Insurance
 13 Act, in turn, reflects a mutual understanding that an injured employee would be
 14 barred from suing Narum. Thus, the “purpose of the overall undertaking” was for
 15 Narum to indemnify UAP, to the extent of Narum’s proportionate responsibility, in
 16 the event an injured Narum employee brought suit against UAP.

17 Narum’s argument that it only agreed to indemnify UAP against suits in
 18 which it is *alleged* to have been partially at fault is inconsistent with this purpose.
 19 As noted above, the parties clearly understood that an injured worker in Hymas’s

20 ² This was the subject of a prior summary judgment ruling. See ECF No. 51.

1 position would be barred from asserting claims against Narum under the Industrial
2 Insurance Act. By logical extension, it stands to reason that the parties did not
3 intend for Narum's indemnification obligation to be contingent upon the injured
4 worker alleging that Narum was partially at fault. Indeed, given that Narum could
5 not have been named as a defendant, it seems logical to assume that the parties
6 anticipated that an injured worker would not make any allegations whatsoever
7 against Narum. Thus, limiting Narum's duty to indemnify to the unusual case in
8 which Narum *is* alleged to have been partially at fault would be an unnatural
9 application of an otherwise straightforward undertaking.

10 For similar reasons, it seems implausible that the parties intended to excuse
11 Narum from indemnifying against claims which purport to target UAP exclusively,
12 but which raise obvious questions about whether Narum was simultaneously (or
13 exclusively) at fault. Adopting this interpretation of the agreement would deprive
14 UAP of a significant benefit of its bargain: having Narum pay defense costs, in
15 proportion to its share of liability, in cases in which Narum is ultimately found to
16 be at least partially at fault. The far more logical interpretation, and the one that is
17 most consistent with the purpose of the overall undertaking, *see Newport Yacht*
18 *Basin Ass'n*, 168 Wash. App. at 100, is that Narum must indemnify UAP for costs
19 incurred in defending against any claim for which UAP might reduce (or
20 eliminate) its own liability by establishing that Narum was simultaneously (or

1 exclusively) at fault, regardless of the allegations in the complaint or the plaintiff's
2 theory of liability. *See Cook v. Nebraska Pub. Power Dist.*, 171 F.3d 626, 635 (8th
3 Cir. 1999) (“[B]asing the application of such an indemnification provision on the
4 actual facts of the case, and not merely on the language of the complaint, is the
5 preferred interpretation where no contrary intent appears.”); *Pike Creek*
6 *Chiropractic Ctr., P.A. v. Robinson*, 637 A.2d 418, 421 (Del. 1994) (“The
7 *indemnatee’s actual wrongdoing* or lack thereof, not a third-party plaintiff’s
8 allegations, should be determinative. Where the indemnitee is free from actual
9 wrongdoing, it should not be divested of its legal right to indemnification due to
10 the unsubstantiated pleading choices of a third party.”) (emphasis added); *Reliance*
11 *Ins. Co. of Illinois, Inc. v. Richfield Hospitality Servs., Inc.*, 92 F. Supp. 2d 1329,
12 1337 (N.D. Ga. 2000) (“The more accepted view of indemnification for
13 negligence, however, is that the Court should look to the actual facts rather than
14 just the allegations made in determining whether the indemnitee was negligent and
15 therefore barred from receiving indemnification.”). Hymas’s premises liability
16 claim easily satisfies that requirement, as both the Benton County Superior Court
17 and the Washington Court of Appeals definitively concluded that Narum, rather
18 than UAP, was negligent.

19 Narum argues that this interpretation of the contract is untenable because
20 Washington law requires a “clear and unequivocal” expression of intent for an

indemnitor (Narum) to indemnify an indemnitee (UAP) for the indemnitee's "sole negligence." ECF No. 80 at 6-8 (citing, *inter alia*, *Nw. Airlines v. Hughes Air Corp.*, 104 Wash.2d 152 154-55 (1985), and *Snohomish Cnty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.*, 173 Wash.2d 829, 836-37 (2012)). While that appears to be an accurate statement of law, it has no application here. The Hymas litigation did not terminate in a finding that UAP was "solely" negligent. To the contrary, the Court of Appeals concluded that Narum was not negligent *at all*. *Hymas*, 167 Wash. App. at 150-65. Accordingly, whether Narum "clearly and unequivocally" agreed to indemnify UAP for UAP's sole negligence is a non-issue. Narum's motion to exclude fees and costs incurred by UAP defending against Hymas's premises liability claim is denied.

B. There are no Triable Issues Regarding Contributory Negligence

1. Negligence by UAP

Narum argues that a jury must decide whether UAP was partially at fault for Hymas's accident. The Court previously addressed this issue in its order granting UAP's motion for partial summary judgment. First, the Court ruled that Narum had effectively conceded that it was solely at fault by failing to respond to UAP's argument on that point. ECF No. 51 at 14. Second, and in the alternative, the Court ruled that there were no genuine issues of material fact concerning Narum's negligence; on the undisputed factual record, a rational jury could only conclude

1 that Narum, rather than UAP, was at fault. ECF No. 51 at 15. In view of this
2 alternative ruling, the Court declined to address whether Narum was bound by the
3 Court of Appeals' ruling in *Hymas*—*i.e.*, that UAP was not negligent as a matter of
4 law—under the “vouching in” doctrine. ECF No. 51 at 17.

5 The Court's earlier ruling on this issue stands. In the interest of eliminating
6 any remaining confusion, the Court will now address the vouching in argument. In
7 simple terms, “vouching in” is a common law device that results in a party who
8 wrongfully refuses to accept a defendant's tender of defense being bound by the
9 factual determinations made in the ensuing litigation. To achieve this result, the
10 defendant must notify the party it seeks to vouch in (the “vouchee”)

11 (1) of the pendency of the suit against him, (2) that if liability is
12 found, the defendant will look to the vouchee for indemnity, (3) that
13 the notice constitutes a formal tender of the right to defend the action,
14 and (4) that if the vouchee refuses to defend, it will be bound in a
subsequent litigation between them to the factual determination
necessary to the original judgment.

15 *Mastro v. Kumakichi*, 90 Wash. App. 157, 164-65 (1998) (citation omitted). These
16 factors are not rigorously applied; so long as the vouchee receives adequate notice
17 of the proceedings, the fact that it is being asked to defend, and the consequences
18 of refusing to do so, the vouchee will be bound. *Id.* at 166.

19 Narum contends that it was not properly vouched in because UAP “did not
20 inform [it] of a present duty to defend, or that it could be ‘bound’ by a decision in

1 the lawsuit if it declined the tender.” ECF No. 80 at 12. This argument is belied
2 by the record. UAP advised Narum that it was contemplating a tender of its
3 defense shortly after being served with Hymas’s complaint. ECF No. 34-3. Two
4 weeks later, Narum responded with a categorical refusal to indemnify:

5 Based upon [our] review, **we do not believe that Narum Concrete**
6 **Construction owes any indemnification to UAP.**

7 * * *

8 The contract between UAP and Narum provides for indemnification
9 [in] § 8.13. However, as stated therein, the obligation of Narum to
10 indemnify UAP applies “only to the extent caused by the negligent
11 acts or omissions of the contractor.” Narum was not negligent.
12 Narum has no contractual obligation to indemnify UAP for negligent
13 acts or omissions of UAP. Therefore, **there are no facts to support**
14 **the indemnification claim made by UAP.**

15 * * *

16 We do not believe that Narum was in any way responsible (i.e.,
17 negligent) for the subject accident. Even if such were found, the
18 Industrial Insurance Act immunizes Narum from such liability. As for
19 the indemnification claim being made by UAP, it is also barred by the
20 Industrial Insurance Act, which bar has not been clearly and
specifically waived in the contract. For these reasons, **we do not**
believe that Narum has a duty to defend UAP from claims based
upon UAP’s negligence.

ECF No. 34-4 (emphasis added). This response illustrates that Narum fully
understood the legal landscape and made a calculated decision to reject any future
tender by UAP. Because Narum made an informed, strategic decision not to
participate in the underlying litigation, it is bound by the Court of Appeals’ ruling

1 that UAP was not negligent. *See Allison v. Ticor Title Ins. Co.*, 907 F.2d 645, 651
2 (7th Cir. 1990) (“Ticor made it crystal clear to all who tendered or inquired that it
3 would not defend. A more formal request would have been a futile gesture.”).

4 2. Contributory Negligence by Hymas

5 Narum also contends that its indemnification liability should be reduced in
6 proportion to any contributory negligence that could be attributed to Hymas. ECF
7 No. 80 at 9-10. Though somewhat unclear, the thrust of this argument appears to
8 be that Narum did not agree to indemnify UAP for contributory negligence
9 attributable to one of its own employees in a lawsuit filed by that injured
10 employee. As noted above, the Court must apply the contract language in a manner
11 consistent with the parties’ intent and the purpose of the overall undertaking. *Scott*
12 *Galvanizing*, 120 Wash.2d at 580; *Newport Yacht Basin Ass’n*, 168 Wash. App. at
13 100. The indemnification provision clearly states that Narum must indemnify
14 UAP “to the extent [the plaintiff’s injury was] caused by the negligent acts or
15 omissions of the Contractor [Narum], a Subcontractor, *anyone directly or*
16 *indirectly employed by them* or anyone for whose acts they may be liable.” ECF
17 No. 34-2 at 8 (emphasis added). Since Hymas was one of Narum’s employees, any
18 contributory negligence attributable to him is expressly within the scope of
19 Narum’s indemnification obligation.
20

1 *Wicklund v. Gus J. Bouten Construction Co.*, 36 Wash. App. 71 (1983), the
2 only case upon which Narum relies, is easily distinguished. In that case, a
3 contractor (Bouten) was found 75% liable for injuries sustained by an employee of
4 a subcontractor (Northwest) in an underlying personal injury action. The injured
5 employee was found 25% contributorily negligent; the employer, Northwest, was
6 found not negligent. Bouten sued Northwest to recover half the damages awarded
7 to the injured employee pursuant to an indemnification agreement which required
8 the parties to share equally in any liability arising from “joint or concurring
9 negligence.” *Wicklund*, 36 Wash. App. at 73. Although Northwest had been found
10 not negligent, Bouten argued that the employee’s negligence should be attributed
11 to Northwest, which would render the parties “jointly and concurrently” negligent
12 and trigger Northwest’s obligation to share equally in the damages. The Court of
13 Appeals rejected this argument, reasoning that “[a]n employer cannot be held to
14 contribution when it has not acted negligently.” *Id.* at 74.

15 In this case, by contrast, the employer (Narum) *has* acted negligently. And,
16 what’s more, the party seeking indemnification (UAP) has *not* acted negligently.
17 In other words, this case presents the converse of the situation at issue in *Wicklund*.
18 Unlike Northwest, Narum is not an innocent indemnitor. Accordingly, there is no
19 bar to attributing Hymas’s contributory negligence to Narum.
20

1 In the final analysis, Narum agreed to indemnify UAP against claims arising
2 from the negligent acts of Narum and its employees—including claims filed by an
3 injured Narum employee. The parties' contract did not carve out an exception to
4 Narum's indemnity obligation for costs attributable to an injured Narum
5 employee's contributory negligence. Thus, under the plain language of the
6 indemnification provision, Narum must also bear the cost of its own employee's
7 contributory negligence.

8 **C. A Jury Must Decide the Amount of Damages to Which UAP is**
9 **Entitled**

10 UAP seeks a ruling that the \$397,549 in attorney's fees and \$44,793 in costs
11 it incurred in defending against Hymas's claims is reasonable as a matter of law.
12 ECF No. 61 at 13-20. Because UAP's entitlement to fees and costs arises under
13 Washington law, the Court must use the "lodestar" method to evaluate whether the
14 requested award is reasonable. This method involves multiplying "the hours
15 reasonably expended in the litigation by each lawyer's reasonable hourly rate of
16 compensation." *Steele v. Lundgren*, 96 Wash. App. 773, 780 (1999). A reasonable
17 hourly rate should account for factors such as the attorney's customary hourly
18 billing rate, the level of skill required by the litigation, the time limitations imposed
19 on the litigation, the amount of potential recovery, the attorney's reputation, and
20 the undesirability of the case. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d

1 581, 597 (1983). The resulting “lodestar” figure constitutes a “presumptively
2 reasonable fee.” 224 *Westlake, LLC v. Engstrom Prop., LLC*, 169 Wash. App.
3 700, 738 (2012).

4 “Attorney fees recoverable pursuant to a contractual indemnity provision are
5 an element of damages, rather than costs of suit.” *Jacob’s Meadow Owners Ass’n*
6 *v. Plateau 44 II, LLC*, 139 Wash. App. 743, 760 (2007). Accordingly, the amount
7 of fees a plaintiff is entitled to recover pursuant to an indemnity provision is
8 generally a question of fact to be resolved by the jury. *See id.* (“[T]he measure of
9 the recovery of attorney fees pursuant to the indemnification provision must be
10 determined by the trier of fact. When trial is to a jury, therefore, the measure of
11 such damages is a jury question.”); *Newport Yacht Basin Ass’n*, 168 Wash. App. at
12 102 (“[A]ttorney fees sought pursuant to a contractual indemnity provision are an
13 element of damages that must be proved to the trier of fact.”). The plaintiff bears
14 the burden of establishing that the amount claimed is reasonable. *Id.* at 761.
15 “[F]actors bearing upon the reasonableness of attorney fees awardable as costs also
16 bear upon the reasonableness of attorney fees recoverable as damages.” *Id.* at 762.

17 The only contested element of the reasonableness calculus is the number of
18 hours billed by UAP’s attorneys in the underlying litigation. UAP argues that the
19 hours billed were reasonable in light of the complexity of the case and the amount
20 of damages potentially at stake (\$2 to 2.5 million). UAP further notes that these

1 hours were actually billed and paid, which UAP urges the Court to consider as a
2 strong indicator of reasonableness. Narum, on the other hand, argues that the
3 number of hours expended was unreasonable because UAP could have extricated
4 itself from the litigation earlier by filing a motion for summary judgment prior to
5 engaging in discovery. In its view, UAP's liability defense was "straightforward
6 and obvious, and the necessary factual record to prepare for summary judgment
7 was apparent and could have been accomplished [more] promptly." ECF No. 80 at
8 17. Because these arguments rely heavily on the opinions of the parties' respective
9 experts, the Court will address the admissibility of the experts' opinions before
10 proceeding any further.

11 The admissibility of expert witness testimony is governed by Federal Rule of
12 Evidence 702. The rule provides:

13 A witness who is qualified as an expert by knowledge, skill,
14 experience, training, or education may testify in the form of an
15 opinion or otherwise if: (a) the expert's scientific, technical, or other
16 specialized knowledge will help the trier of fact to understand the
17 evidence or to determine a fact in issue; (b) the testimony is based on
sufficient facts or data; (c) the testimony is the product of reliable
principles and methods; and (d) the expert has reliably applied the
principles and methods to the facts of the case.

18 Fed. R. Evid. 702.

19 In *Daubert v. Merrell Dow Pharm., Inc.*, the Supreme Court directed trial
20 courts to perform a "gatekeeping" function to ensure that expert testimony

1 conforms to Rule 702's relevance and reliability requirements. 509 U.S. 579, 597
2 (1993). *Daubert* identifies four non-exclusive factors a court may consider in
3 assessing the relevance and reliability of expert testimony: (1) whether a theory or
4 technique has been tested; (2) whether the theory or technique has been subjected
5 to peer review and publication; (3) the known or potential error rate and the
6 existence and maintenance of standards controlling the theory or technique's
7 operation; and (4) the extent to which a known technique or theory has gained
8 general acceptance within a relevant scientific community. *Id.* at 593-94. These
9 factors are not to be applied as a "definitive checklist or test," but rather as
10 guideposts which "may or may not be pertinent in assessing reliability, depending
11 on the nature of the issue, the expert's particular expertise, and the subject of his
12 testimony." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999). The
13 ultimate objective is to "make certain that an expert, whether basing testimony
14 upon professional studies or personal experience, employs in the courtroom the
15 same level of intellectual rigor that characterizes the practice of an expert in the
16 relevant field." *Id.* at 152.

17 1. Stephen Todd (Narum's Attorney's Fees Expert)

18 Narum's expert, Stephen Todd, is prepared to opine that (1) UAP could have
19 avoided substantial defense costs by moving for summary judgment prior to
20 embarking on discovery; and (2) UAP is not entitled to recover defense costs

1 associated with Hymas's premises liability claim because the claim was asserted
2 solely against UAP. ECF No. 66-1 at 3-8. UAP challenges the admissibility of the
3 first opinion on the ground that it is unreliable and unduly speculative, and seeks to
4 exclude the second opinion on the ground that it constitutes an impermissible legal
5 conclusion. ECF No. 65 at 2.

6 Mr. Todd's first opinion is admissible. While it is true that this opinion
7 relies on "speculation" that an earlier motion for summary judgment would have
8 been granted, that is all anyone in Mr. Todd's position can offer. No expert (or
9 trier of fact, for that matter) can say for sure whether the state trial court would
10 have granted a motion for summary judgment filed prior to discovery. An expert
11 with Mr. Todd's qualifications can, however, offer an opinion about the *likelihood*
12 that such a motion would have been granted based upon the facts and legal theories
13 involved. In Mr. Todd's opinion, the likelihood that an earlier summary judgment
14 motion would have been granted is high. This opinion is neither unreliable nor
15 unduly speculative. It is a proper subject of expert testimony. *Jacob's Meadow*,
16 139 Wash. App. at 761.

17 Mr. Todd's second opinion, on the other hand, is inadmissible. Whether
18 UAP is entitled to recover litigation costs relating to Hymas's premises liability
19 claim is a pure question of law. As such, this issue is not a proper subject of expert
20 testimony. *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443,

1 447 (9th Cir. 1992) (expert opinion on pure issue of law inadmissible under Rule
2 702). UAP's motion to strike this portion of Mr. Todd's testimony is granted.

3 2. Anthony Shapiro (UAP's Attorney's Fees Expert)

4 UAP's expert, Anthony Shapiro, stands prepared to opine that the hours
5 billed by UAP's attorneys are reasonable in view of the complexity of the case, the
6 amount of damages potentially at stake, the fact that UAP actually paid for the
7 work, the quality of opposing counsel's representation, and the results obtained.
8 ECF No. 73, Ex. 5. Narum moves to exclude Mr. Shapiro's anticipated testimony
9 on the ground that he lacks sufficient expertise and that his opinions are unreliable.
10 ECF No. 72 at 5-10.

11 Narum's challenges are not well-taken. Mr. Shapiro is an attorney who has
12 been practicing law since 1982. He is a named partner in a respected litigation
13 firm and leads the firm's personal injury group. He has handled "hundreds" of
14 personal injury cases. He has been named a "Super Lawyer" and has been given
15 an "AV" rating by Martindale-Hubbell. He also teaches trial practice at the
16 University of Washington School of Law and frequently teaches at the National
17 Institute of Trial Advocacy. ECF No. 73, Ex. 5. Mr. Shapiro is eminently well-
18 qualified to offer an opinion as to the reasonableness of UAP's attorney's fees.

19 Further, contrary to Narum's assertions, Mr. Shapiro's reliance upon the
20 lodestar method to assess the reasonableness of UAP's litigation costs is proper.

1 *Jacob's Meadow*, 139 Wash. App. at 762 (“[F]actors bearing upon the
2 reasonableness of attorney fees awardable as costs also bear upon the
3 reasonableness of attorney fees recoverable as damages.”). Narum’s motion to
4 exclude Mr. Shapiro’s testimony is therefore denied.

5 Having thoroughly reviewed the record, the Court concludes that a jury must
6 decide whether the amount of attorney’s fees and costs incurred by UAP in the
7 underlying litigation is reasonable. Although the Court would likely approve the
8 request as reasonable if the fees were being awarded as costs, the fees sought here
9 are an element of UAP’s damages. *Jacob’s Meadow*, 139 Wash. App. at 760. As
10 such, a jury must decide whether the amount claimed by UAP is reasonable; the
11 Court cannot substitute its judgment for that of the jury given that the parties have
12 come forward with conflicting expert testimony on the issue of reasonableness.
13 *See Wyler Summit P’ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1192 (9th Cir.
14 2000) (“Weighing the credibility of conflicting expert witness testimony is the
15 province of the jury.”). Accordingly, UAP’s motion for partial summary judgment
16 on the issue of damages is denied.

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IT IS HEREBY ORDERED:

1. Plaintiff's Motion for Summary Judgment re: Damages (ECF No. 61) is **DENIED**.
2. Defendant's Motion for Partial Summary Judgment re: Premises Liability (ECF No. 69) is **DENIED**.
3. Plaintiff's Motion to Exclude the Testimony of Stephen M. Todd (ECF No. 65) is **GRANTED in part** and **DENIED in part**. Mr. Todd's opinion that UAP may not recover litigation costs relating to Hymas's premises liability claim are hereby **STRICKEN**. No testimony on this subject may be offered to the jury.
4. Defendant's Motion to Exclude the Testimony of Anthony Shapiro (ECF No. 72) is **DENIED**.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel.

DATED June 18, 2014.



Thomas O. Rice
THOMAS O. RICE
United States District Judge